IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

EDA M. DURAN, an individual,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N16C-12-034 JRJ
	)	
EASTERN ATHLETIC CLUBS LLC d/b/a HOCKESSIN ATHLETIC CLUB, a domestic corporation.	)	
	)	
Defendant.	)	

OPINION

Date Submitted: April 24, 2018
Date Decided: June 7, 2018

Upon Defendant's Motion for Summary Judgment: **DENIED.**

Tara E. Bustard, Esquire and Matthew R. Fogg, Esquire (argued), Doroshow, Pasquale, Krawitz & Bhaya, 1208 Kirkwood Highway, Wilmington, Delaware, Attorneys for Plaintiff.

Jennifer D. Donnelly, Esquire, Marshall Dennehey Warner Coleman & Goggin, 1007 N. Orange Street, Suite 600, Wilmington, Delaware, Attorney for Defendant.

Jurden, P.J.

I. INTRODUCTION

Plaintiff Eda M. Duran alleges she was injured while participating in a Zumba class when her right foot caught the edge of a mat containing weight equipment, causing her to fall into the weights. She claims she fell because she was focusing on the Zumba instructor, overcrowding forced her to shift toward the dangerous mat, and the Defendant permitted a dangerous condition to exist. The Defendant, Eastern Athletic Clubs LLC d/b/a Hockessin Athletic Club ("HAC"), has moved for summary judgment, arguing it owed no duty to warn Duran of the "open and obvious danger," i.e., the weights stored on the mat, and there is no evidence that the exercise room was overcrowded. For the reasons explained below, HAC's Motion for Summary Judgment is **DENIED**.

II. FACTS

HAC is a private fitness club. Duran, who is a member of HAC, has been taking Zumba and Body Pump classes there since 2007.[1] For approximately six years prior to her injury, the Zumba and Body Pump classes were held in the same exercise room in which she fell.[2] On the day Duran fell, she estimated there were

[1] Def.'s Mot. Summ. J. Ex. A, Eda Duran Dep. Tr. Dated May 10, 2017 ("Duran Dep. Tr."), 19:20–22, 20:9–22 (Trans. ID 61500374) (D.I. 52). Plaintiff testified she attended Zumba and Body Pump classes multiple times a week unless she was out of town or sick.

[2] *Id.*, 33:4–8. Plaintiff testified she took several hundred Zumba classes in that room.

fifty people in the Zumba class.[3] She had her "usual" spot on the far side of the room, but had to shift over toward the "dangerous mat" as more people entered the room.[4]

Musulain Toomer, the Zumba instructor teaching when Duran fell, testified that Zumba is a fast-paced, high-intensity workout to music that requires participants to focus on the instructor,[5] and the instructor often changes locations during class.[6] Toomer also testified she never received any training from HAC regarding the amount of space each participant requires to safely participate in a Zumba class.[7]

Susan Storm, the Group Fitness Director at HAC, testified as a corporate designee on behalf of HAC regarding its rules and guidelines for group classes from 2007 through the present. She confirmed that Zumba is fast-paced and it is important that Zumba participants focus on the instructor.[8] Storm also confirmed that, at the time Duran fell, there were weights on a rubber mat in the corner of the exercise

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[3] *Id.*, 28:3–7; 63:21–64:1. Plaintiff testified that it was "usual" to have 50 people in class, and that on the day she fell she felt the class was crowded.

[4] *Id.*, 64:2–12. When asked whether she could have moved away from the mat during class, Plaintiff answered "no" because she "would have to be one of those people that was squeezing in and I don't do that." HAC Group Fitness Director Susan Storm testified that the capacity for the fitness room was 42. *See* Pl.'s Resp. to Def.'s Mot. Summ. J. Ex. B, Susan Storm Dep. Tr. Dated June 15, 2017 ("Storm Dep. Tr."), 15:22–16:1. A HAC attendance log noted 50 people were present at the time Duran fell. *See* Pl.'s Resp. to Def.'s Mot. Summ. J. ¶ 15.

[5] Pl.'s Resp. to Def.'s Mot. Summ. J. Ex. A, Musulain Toomer Dep. Tr. Dated Apr. 11, 2017 ("Toomer Dep. Tr."), 28:1–29:9 (Trans. ID 6679751) (D.I. 60).

[6] *Id.*, 80:15–19, 82:7–84:1.

[7] *Id.*, 47:1–6.

[8] Pl.'s Resp. to Def.'s Mot. Summ. J. ¶ 3.

room.[9] Storm testified that there were no specific rules or guidelines that applied to the Zumba class.[10] Although HAC was aware (based on a conversation with the fire marshal) that the capacity for the Zumba class was 42 (based on the need to have 50 square feet per person),[11] there were no policies or procedures in place at HAC to make sure the class was not over capacity.[12] Storm also testified she was unaware of any national or industry standards applicable to the exercise room where the Zumba class was held.[13]

According to HAC member Liliana Garland, the mat was "just in the wrong spot." "It was an uneven floor in a place where there's a lot of movement."[14] Duran's expert on fitness center safety, Dave Parise, CPT, FPTA, opined that a mat with an unbeveled edge located on an exercise room floor during a Zumba class is unsafe.[15] According to Parise, the floor should be free and clear of potential tripping hazards which participants would not expect to encounter, especially when there is side-to-side movement and participants need to focus on the instructor.[16] In Parise's expert opinion, the Zumba class was overcrowded at the time Duran fell, and

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[9] Storm Dep. Tr., 11:14–18.
[10] *Id.*, 13:15–18.
[11] *Id.*, 15:22–16:9.
[12] *Id.*, 16:10–13.
[13] *Id.*, 17:14–18.
[14] Pl.'s Resp. to Def.'s Mot. Summ. J. ¶ 5.
[15] Pl.'s Resp. to Def.'s Mot. Summ. J. Ex. F ("Parise Disclosure") ¶¶ 3, 8.
[16] *Id.* at ¶ 3.

overcrowding caused participants to shift their positions, placing Duran dangerously close to the dangerous mat.[17]

III. STANDARD OF REVIEW

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[18] The moving party initially bears the burden of establishing the non-existence of material issues of fact.[19] The Court must view the record in the light most favorable to the non-moving party.[20] Summary judgment may not be granted when "it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[21] Negligence actions are not ordinarily disposed of on a motion for summary judgment.[22] Unresolved issues of fact as to the defendant's negligence, proximate cause, and the parties' respective degrees of negligence

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[17] *Id.* at ¶ 4.
[18] Super. Ct. Civ. R. 56(c).
[19] *Moore v. Sizemore*, 405 A.2d 679, 680–81 (Del. 1979). If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.
[20] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[21] *Mumford & Miller Concrete, Inc. v. New Castle Cty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).
[22] *Reid v. Hindt*, 2005 WL 2143706, at *2 (Del. Super. Aug. 17, 2005).

usually present questions of fact for the jury, however, in rare cases summary judgment is appropriate.[23]

IV. DISCUSSION

Under Delaware law, to prevail on a negligence claim, a plaintiff must prove: (1) that the defendant owed plaintiff a duty and (2) the breach of that duty proximately caused plaintiff's injury.[24] When the parties are a landowner and a business invitee, the landowner has a duty to employ reasonable measures to warn to protect a business invitee of a condition that poses unreasonable risk of harm if the landowner knows or should know of such condition.[25] However, there is no duty to warn of, or protect business invitees from, an open and obvious danger.[26] An "open and obvious danger" is one that "creates a risk of harm that is visible...is a well-known danger, or what is discernible by [casual] inspection...to those of ordinary intelligence."[27] It is a danger "so apparent that the invitee can reasonably be expected to notice it and protect against it because the condition itself constitutes

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[23] *Id.*; *Trievel v. Sabo*, 714 A.2d 742, 745 (Del. 1998) (holding, "the determination of the respective degrees of negligence attributable to the parties usually presents a question of fact for the jury.").
[24] *Staedt v. Air Base Carpet, Inc.*, 2011 WL 6140883, at *2 (Del. Super. Dec. 6, 2011) (citation omitted) (internal quotation marks omitted).
[25] *Id.* (citation omitted).
[26] *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2 (Del. Super. July 8, 2016) (citing *Niblett v. Pennsylvania R.R. Co.*, 158 A.2d 580, 582 (Del. Super. Mar. 8, 1960) (holding "there is no duty upon the owner to warn an invitee of a dangerous condition which is obvious to a person of ordinary care and prudence.")).
[27] *Id.* (quoting *Macey v. AAA–1 Pool Builders & Serv. Co.*, 1993 WL 189481, at *3 (Del. Super. Apr. 30, 1993)). Delaware case law has mistakenly held open and obvious dangers are discernible by "causal" inspection. The Court clarifies, here, that open and obvious dangers are discernible by "casual" inspection.

adequate warning."[28] Generally, whether a dangerous condition exists and whether the danger was apparent to the plaintiff are questions for the jury.[29] But in "very clear cases" this is not so.[30]

The question here is whether this is one of those "very clear cases." HAC argues it is, and relies on *Jones v. Clyde Spinelli, LLC*.[31] The plaintiff in *Jones* was injured when she reached out to try and stop her companion from falling over a space heater located on the floor in the middle of an office. The space heater was not partially hidden or difficult to see. The plaintiff and her companion admitted they saw the space heater on the floor and had successfully maneuvered around it for several minutes before the incident. The Court in *Jones* held that the space heater was an open and obvious danger and, therefore, the defendant had no duty to warn the plaintiff about it.[32]

HAC also relies on *Clifton v. Camden-Wyoming Little League, Inc.*[33] In *Clifton*, the plaintiff fell after stepping into a "pothole" at the little league fields. Plaintiff described the pothole as a "depression of a dirt hole in the ground in an area

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[28] *Id.* (quoting *Niblett*, 158 A.2d at 582–83 (finding that as a matter of law "there was no duty…to either warn deceased of, or protect him from, the danger inherent in his act of crossing the [train] tracks.")).
[29] *Id.* (citing *Williamson v. Wilmington Hous. Auth.*, 208 A.2d 304, 305–06 (Del. 1965)).
[30] *Id.*
[31] *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409 (Del. Super. July 8, 2016).
[32] *Id.* at *3 (granting summary judgment because "[a] space heater in the middle of a floor should be obvious to a person of ordinary care and prudence."
[33] C.A. No. K12C–06–022 (Del. Super. Jan. 21, 2014).

that was in the middle of an asphalt or concrete paved area." The incident occurred on a clear, sunny day and plaintiff was looking in front of himself when he fell. The Court in *Clifton* held that the pothole (a dirt and gravel filled area two feet in circumference that is a "good size") did not pose an unreasonable and foreseeable risk of harm to any member of the public and its existence was not evidence of a defect.[34] The Court in *Clifton* went on to say that even if the pothole did pose a danger, the condition was obvious to a reasonably prudent person.[35]

Duran submits that there is a key difference between *Jones* and *Clifton* and her case: the existence of a distraction.[36] "An exception to the open and obvious doctrine applies when there are attendant circumstances surrounding the event that would distract the [business invitee] causing a reduction in the degree of care an ordinary person would exercise at the time."[37]

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[34] *Id.* at *5 (citing *Polaski v. Dover Downs, Inc.*, 2012 WL 1413577, at *3 (Del. Super. Jan. 20, 2012)).
[35] *Id.*
[36] *Cf. Wilcox v. 1776 Restaurant, L.L.C.*, 2014 WL 1312680, at * 1 (Del. Super. Apr. 1, 2014) (denying summary judgment because "certain circumstances can sometimes negate open and obvious conditions, such as the existence of distractions.") (citing *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 642 (Del. 1964) (reversing the trial court's decision to grant summary judgment because "a customer walking along an aisle of a store glancing at shelves displaying merchandise lining the aisle may be excused from keeping a constant lookout on the floor to observe a dangerous condition, particularly in the view of the customer's right to assume a safe condition on the floor.")).
[37] *Conrad v. Sears, Roebuck and Co.*, 2005 WL 758199, at *2 (Ohio Ct. App. Apr. 5, 2005).

The facts in the instant case are akin to those in *Sweiger v. Delaware Park, L.L.C.*[38] and *Taney v. Independent Sch. Dist. No. 624.*[39] In *Sweiger*, the plaintiff suffered injuries when she walked into an unmarked glass window located in a "dimly lit alcove" while entering "a more brightly lit casino floor."[40] The plaintiff argued that the lights and distractions from the casino caused her to walk into the unmarked glass and fall to the floor.[41] Recognizing that distractions can be an exception to the "open and obvious" rule, the Court denied summary judgment because "distractions from the casino…make[] the question of whether a warning was warranted one for the jury."[42]

In *Taney*, the plaintiff fell over a nine-inch drop-off at the threshold of a door. The plaintiff testified that when she opened the door and stepped outside, the lights and people in the hallway across the courtyard distracted her.[43] She never noticed the nine-inch drop-off and broke her hip as a result of her fall.[44] The Court in *Taney* held "where there is some distraction or other reason which will excuse the failure

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[38] 2013 WL 6504641 (Del. Super. Dec. 3, 2013).
[39] 673 N.W.2d 497 (Minn. Ct. App. Jan. 13, 2004). The Court adopted the Court of Appeals of Minnesota's explanation of the distraction exception in *Sweiger*.
[40] *Sweiger*, 2013 WL 6504641, at *2.
[41] *Id.*, at *1.
[42] *Id.* at *2.
[43] *Taney*, 673 N.W.2d at 501.
[44] *Id.*

to see that which is in plain sight, it can be said that a person has exercised that degree of care required of an ordinarily prudent person."[45]

Here, Duran was focused on the Zumba instructor[46] and moving constantly – in part because of the Zumba dance moves, and in part because as more people entered the room, she and others had to shift toward the mat to make room for the newcomers. Unlike the plaintiff in *Jones*, who was stationary in an office for many minutes and had previously maneuvered around the space heater in the middle of an open floor, and unlike the plaintiff in *Clifton*, who was outside on a clear day, walking forward and looking ahead, Duran was moving constantly with her attention focused on her instructor. She was dancing, moving side-to-side, and changing directions in a room with 50 people. The crowded exercise room and the resultant lack of ample space for Duran and other participants (in a fast-paced class where there is "a lot of movement") resulted in her being placed dangerously close to the mat.

Viewing the facts in the light most favorable to Duran, this is *not* a clear case. This is a case for a jury to decide. The jury will determine whether HAC breached

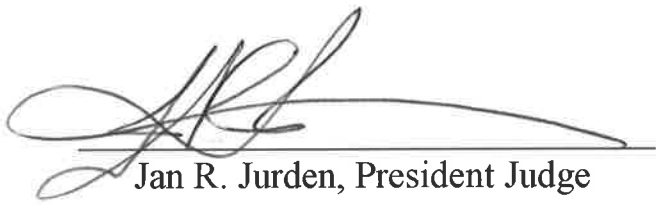
[45] *Id.* at 503.
[46] Toomer Dep. Tr., 28:1–29:9.

a duty to Duran,[47] its business invitee, and if so, what injuries she sustained as a proximate result of that negligence.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

Original to Prothonotary
cc: Tara E. Bustard, Esq.
Matthew R. Fogg, Esq.
Jennifer D. Donnelly, Esq.

[47] *See Williamson*, 208 A.2d at 306 (reversing the trial court's decision to grant summary judgment because "[t]he question of what constitutes a dangerous condition in a situation of this kind cannot be settled by any formula or hard and fast rule. The existence or non-existence of a dangerous condition must depend upon the facts and circumstances of each case and is generally a question of fact for the jury to determine except in very clear cases.").